

Association of Gallatin Agriculture Irrigators Public CommentKrista Lee Evans

Support SB 35.

1. Important to point out that the case from which these issues have arisen – PPL v. Montana is currently on appeal to the United States Supreme Court. In the event this case is not overturned by the court this bill is absolutely necessary to provide for due process for Montana property owners as well as a clear process by which a lease, license, or easement is granted.
2. This bill was requested by two interim committees - the water policy interim committee and the environmental quality council. The votes coming out of both committees were unanimous.

Background

1. Equal Footing doctrine – when each state became part of the union they were given the same rights as existing states so that they entered on an “equal footing”. One of these rights was the title to beds of rivers that are navigable for title. The state adopted 70-16-201 in 1895 where the legislature made it clear that the state owns the beds up to the low water mark. The court confirmed this in U.S. v. Eldredge, 33 F. Supp. 337 (D.C. Mont. 1940).

Public Trust Doctrine – addresses the fact that the state owns the waters of Montana and the people of Montana have the right to access and use them. There is no intent with this bill to impact recreational use of streams. Hunting, fishing and trapping are specifically exempted in Section 4, subsection (9) and Section 7 subsection (1)(b)

This bill does not address the public trust doctrine and applies only to the equal footing doctrine.

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2. Navigable for Title means that the river was used for commercial purposes at the time of statehood. **November 8, 1889**. The federal test that is used by the courts to determine whether a river is navigable for title was first articulated in The Daniel Ball, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870):

“Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.”

This is clearly a fact specific determination best made by a court of competent jurisdiction.

What the bill does

1. First and most importantly SB 35 provides for due process. The state (DNRC) asserts that the state owns certain beds of certain rivers. [An analogy is your neighbor asserts that they own 20 feet inside of your fence line]

The state cites historic documents that they claim shows that certain streams and rivers meet the navigability test provided in the Daniel Ball case. In fact, the state has required users of river beds to pay for the use of those river beds as they would for other state lands. The element that is missing in this process is the right of the entity whose title says they own the land to reject the DNRCs claim of ownership. [If your neighbor was held to this standard they could simply require you to pay them and you would never have the right to argue your set of facts in front of a judge or present your documentation showing that YOU own the property].

Determination of navigability for title is a very fact specific determination and can only be made by a court of law where both sides of the issue have the opportunity to provide their facts. Under the current process followed by DNRC the landowner is not given the opportunity to show their facts – the state just asserts ownership of the bed of the river.

Section 2, subsection (3) defines a navigable river (for the purposes of this bill) to be one that is determined navigable by a court.

It is critical that landowners be given a right to show their facts with regard to ownership and this can only be done through a court of law. This bill requires that be done. All other property owners in Montana are held to this standard and the state should be as well.

2. Section 77-1-105, which was passed in 1937, provides that ***“the board may take all proper proceedings for the purpose of determining the title to the beds of lakes and other bodies of water and of streams within the state and to that end may bring or defend suits or other proceedings in court or before other proper tribunals.”***

This section provided direction – way back in 1937 – that the board of land commissioners go to court to ascertain ownership of riverbeds. Though this has not happened in the past it is clear that the intent of this section fits well with the intent of SB 35 and the land board clearly has the authority to prove ownership through a court of competent jurisdiction.

3. Currently DNRCs easements have a disclaimer that makes it clear that they do not “warrant title”. Therefore, without a court determination, even if someone buys an easement from the state it doesn’t necessarily mean anything – they may be paying the state to use property that the state doesn’t even own.

The primary question to be answered by a court is not when title was vested in the state but if title was vested in the state.

4. Some have suggested an administrative process as adequate due process. While this may seem to meet due process requirements on its face because of the opportunity to appeal to district court there are significant problems.

First, the entity that would be receiving the money from future rentals is the entity conducting the hearings – clearly a conflict of interest.

Second, this simply increases the cost for structure owners because now they have to pay for an administrative process as well as a judicial appeal.

Third, and probably most importantly, this shifts the burden of proof. If the structure owner appeals an administrative decision to district court then the burden of proof is on the structure owner to prove that the state doesn't own the property. If the action is started in district court (absent the administrative process) the state – who is asserting ownership – must prove that they own the river bed rather than the structure owner. The state is the entity asserting ownership – it is appropriate that they bear the burden of proof.

5. The bill provides two different processes for structure owners to acquire a lease, license, or easement:

1) a process for "historic" structures or structures that existed on the date this bill becomes law or a river is determined to be navigable by a court. This is similar to the provisions in 77-1-107 which grants easements for historic road rights of way. The applicant requests that a lease, license, or easement be granted by the land board and it must be granted provided that full market value as determined by rule or statute is paid.

2) a process to be followed for new structures. In this process an applicant applies for a lease, license, or easement and the land board grants one of the three which they feel is most applicable to the type of use. Full market value must be paid.

6. In the fiscal note there is discussion about the common school fund and impacts to school funding. There are a couple of important points to raise:

1) The PPL v Montana case is still under appeal

2) The PPL v Montana decision at the Montana Supreme Court determined that river beds were "public trust lands" and therefore it is a policy choice and the responsibility of the legislature to determine where this money will go. In fact, this is currently being debated in the legislature under Rep Hollandsworth's HB 165. While the legislature may decide that the proper recipient of this rental is the common schools trust that decision has not yet been made.

7. The formula that was used to determine PPL Montana's \$40 M plus judgment is called the defined benefits theory. Under this formula a percentage of the income resulting from the use of the river bed is owed to the state. If this formula were to be applied to irrigators it could put many out of business.

This bill clarifies that the formula that will be used to determine rental rates must be adopted through statute or rule. This is a critical element of the bill.

8. In summary – this bill balances two constitutional rights

The first is related to water rights and is contained in Article IX, section 3 of the Montana Constitution which provides that all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

The second is Article X, section 11 which controls the disposition of state land or any estate or interest in state land including the requirement that full market value be ascertained.

Please support SB 35 so that structure owners can continue to operate their businesses as they have, in some instances, for over 100 years. Section 77-1-105, which became law in 1937 provided clear direction to the land board on how to determine title to streambeds. It is inappropriate to expect irrigation diversion owners and other structure owners to now be faced with some unknown process and an “assertion” of ownerships. This bill provides a balance for all interests and most important provides for due process.